IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs February 26, 2009

DAWN BROWN, ET AL. v. TENNESSEE TITLE LOANS, INC.

Appeal from the Circuit Court for Hamilton County
No. 04C1682 Jacqueline E. Bolton, Judge

No. E2008-01758-COA-R9-CV - FILED JULY 24, 2009

We accepted this interlocutory appeal to consider "the sole issue of whether the Tennessee Title Pledge Act ["the Act"], Tenn. Code Ann. § 45-15-101, et. seq. [(2007)] provides . . . a private right of action." Defendant is a "title pledge lender" as defined in the Act. Plaintiffs all allegedly obtained loans from the defendant and, again allegedly, were charged interest and fees, including a "redemption premium," not allowed by the Act. The trial court granted defendant's motion to dismiss all claims based on alleged violations of the Act, holding that the Act does not afford a private right of action. The trial court granted plaintiffs' motion for an interlocutory appeal pursuant to Tenn. R. App. P. 9. Plaintiffs then filed a timely application for permission to appeal to this Court, which we granted, limited to the stated issue. We now vacate the order of dismissal and remand for further proceedings.

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Circuit Court Vacated; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

James R. Kennamer, Chattanooga, Tennessee, for the appellants, Dawn Brown, Anne Devries, Carly Hahn and Greg Walton.

Charles D. Lawson and J. Barlett Quinn[1], Chattanooga, Tennessee, for the appellee, Tennessee Title Loans, Inc.

OPINION

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[1] Attorneys Stephen M. Forte and Shannan F. Oliver of Atlanta, Georgia, are also listed on the brief, but apparently they have not been admitted on a *pro hac vice* basis.

I.

A.

The facts before us, as alleged in the amended complaint, are as follows:

> The plaintiffs, Dawn Brown, Anne Devries, Carly Hahn and Greg Walton, are residents and citizens of Tennessee. Class plaintiffs are all individuals who were customers and borrowers from the defendant, Tennessee Title Loans, Inc. within the year preceding the filing of this Complaint and thereafter who have been charged interest in excess of the statutory maximums and/or have been charged fees including a "redemption premium fee" in excess to that which was and is allowable under the Tennessee Title Pledge Act. The Act does not allow a fee for redeeming the loan.
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> * * *
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> The plaintiffs in this matter seek certification of class action against the defendant for amounts charged during the Applicable Period to the plaintiffs by the defendant in contravention of the Tennessee Title Pledge Act.
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> * * *
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> For the year prior to the filing of this Complaint and thereafter, the defendant had/has charged interest and/or fees (particularly a "redemption premium fee") to the named plaintiff, Dawn Brown[2], which were not allowable by the Tennessee Title Pledge Loan Act as reflected by the illegal loan documents attached hereto. . . . Named plaintiff has paid interest and/or fees as charged by the defendant. The named plaintiff's loan was renewed monthly during the Applicable Period and was charged a "redemption premium fee" that is and was not an allowed fee or penalty under the Tennessee Title Pledge Loan Act (the "Act"). The subject loan agreements are illegal and in violation of the Tennessee Title Pledge Act. . . .
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> * * *
>
> The defendant, Tennessee Title Loans, Inc., charged the named plaintiffs and class plaintiffs amounts no[t] allowed in T.C.A. § 45-

[2]The complaint repeats the allegations for each named plaintiff.

> 15-111 specifically by charging a "redemption premium fee." Said fee bears no relation to anything allowed under the Act and is calculated purely according to date of payment of the loan. Plaintiffs were forced to pay said sums to the defendant. Fees for redeeming the loan are not allowed under the Act. The plaintiffs allege that the defendant was and is guilty of willful and wanton conduct by illegally contracting, charging and taking interest and/or fees in violation of the Act whereby the plaintiffs request the damages including return of overcharges in interest and/or fees during the Applicable Period and other appropriate damages for violation of the Tennessee Title Pledge Loan Act, plus interest and costs. . . .

The amended complaint also alleged violations of the Tennessee Consumer Protection Act and common law fraud and rescission.

B.

Defendant filed a motion to dismiss, originally on the ground that everything it did was permissible under the Act. The trial court ordered additional briefing, including, specifically, "whether the Tennessee Title Pledge Act provides a private cause of action." After oral argument, the court dismissed the consumer protection claims based upon the authority of ***Walker v. Sunrise Pontiac-GMC Truck, Inc.***, 249 S.W.3d 301 (Tenn. 2008), and dismissed all claims based on the Act, holding that "there is no private right of action under the Act." This ruling, entered May 19, 2008, left pending only the common law claims.

Plaintiffs' motion for interlocutory appeal and application to this court resulted in an order allowing this appeal, limited as follows:

> Petitioners are before this Court seeking an Interlocutory Appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. We find this to be an appropriate situation in which to allow an Interlocutory Appeal, and Petitioners' Application for Permission to Appeal is GRANTED. This Interlocutory Appeal is limited to the sole issue of whether the Tennessee Title Pledge Act, Tenn. Code Ann. § 45-15-101 et seq., provides for a private right of action. All proceedings in the Trial Court on this matter are stayed pending resolution of this Interlocutory Appeal or further orders of this Court.

(Capitalization in original.)

II.

We now turn to the sole issue before us: Whether the Act creates a private right of action. We take the factual allegations of the amended complaint at face value, as we must in reviewing a

dismissal for failure to state a claim. ***Premium Finance v. Crump Ins. Services***, 978 S.W.2d 91, 92 (Tenn. 1998). We review the trial court's legal conclusions *de novo*, including its determination that the Act does not create a private right of action. *See*, ***Id.,*** at 93.

It is appropriate to first recognize a few general rules applicable to the construction of statutory language:

> Our duty in construing statutes is to ascertain and give effect to the intention and purpose of the legislature. Legislative intent is to be ascertained whenever possible from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language.
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> When the statutory language is clear and unambiguous, we must apply its plain meaning in its normal and accepted use, without a forced interpretation that would limit or expand the statute's application. Where an ambiguity exists, we must look to the entire statutory scheme and elsewhere to ascertain the legislative intent and purpose. The statute must be construed in its entirety, and it should be assumed that the legislature used each word purposely and that those words convey some intent and have a meaning and a purpose. The background, purpose, and general circumstances under which words are used in a statute must be considered, and it is improper to take a word or a few words from its context and, with them isolated, attempt to determine their meaning.

Eastman Chemical Co. v. Johnson, 151 S.W.3d 503, 507 (Tenn. 2004) (citations and quotation marks omitted).

The general outline for determining whether a statute creates a private right of action is stated in ***Crump*** as follows:

> Where a right of action is dependent upon the provisions of a statute, our courts are not privileged to create such a right under the guise of liberal interpretation of the statute. Only the legislature has authority to create legal rights and interests. Thus, the burden of establishing the existence of a statutory right of action lies with the plaintiff.
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> In determining whether the legislature intended to grant a statutory right of action, we begin by examining the language of the statute. If no cause of action is expressly granted therein, then we must determine whether such action was intended by the legislature and thus is implied in the statute. To do this, we consider whether the

> person asserting the cause of action is within the protection of the statute and is an intended beneficiary. The statute's structure and legislative history are helpful in making this determination.

Id. at 93 (citations omitted.)

The Act was first enacted in 1995. It was substantially amended in 2005. Its stated purpose is as follows:

> The making of title pledge loans vitally affects the general economy of this state and the public interest and welfare of its citizens. It is the policy of this state and the purpose of this chapter to:
>
> (1) Ensure a sound system of making title pledge loans though statewide licensing of title pledge lenders by the department of financial institutions;
>
> (2) Establish licensing requirements;
>
> (3) Provide for the examination and regulation of title pledge lenders by the department of financial institutions; and
>
> (4) Ensure financial responsibility to the public.

Tenn. Code Ann. § 45-5-102. The Act, among other things, authorizes a licensed title pledge lender to make loans on pledges of titles and titled property and sets a one-year statute of limitations on actions "brought by a pledgor against a title pledge lender," § 45-15-104; makes a license mandatory, § 45-15-105(a); voids any loan made without a license and provides a remedy to borrowers, § 45-15-105(b); sets forth what must be done to qualify for and obtain a license, including a surety bond made subject to a private right of action, § 45-15-106; outlines the ability of the commissioner of financial institutions to revoke licenses, § 45-15-107; gives the commissioner authority to promulgate rules and regulations, § 45-15-108; establishes reporting requirements, § 45-15-109; requires a record of all transactions, including certain disclosures that must be made to borrowers, § 45-15-110; sets maximum interest and related charges, § 45-15-111; establishes the maximum time span for loans and regulates renewals, § 45-15-113; prohibits listed actions by lenders, § 45-15-115; grants the commissioner authority to determine violations and take certain actions against lenders, § 45-15-118 (a) and (d); and allows an aggrieved person to file a "written complaint" which the commissioner "may" investigate, § 45-15-118(c).

Plaintiffs' "Argument and Law," presented to sustain their burden of establishing a statutory right of action, in toto is:

> T.C.A. § 45-15-104(b) states "No action shall be brought by a pledgor against a title pledge lender in connection with a title pledge agreement or property [p]ledge agreement more than one (1) year after the date of the alleged occurrence of any violation of this chapter." Plaintiffs rely upon the plain language of the statute. This can't be any clearer. The statute of limitations is similar in wording to other statutes of limitation applicable to civil actions.

In other words, since the Act contains a limitations period, the legislature must have meant that pledgors could bring actions against title pledge lenders. Defendant characterizes the argument as an oversimplification to the point of being "almost flippant," but stops short of arguing that it is without logic. The argument, though bare of authority, is in keeping with the well-established rule of statutory construction we quoted from ***Eastman*** that each word must be viewed as chosen to convey a meaning and purpose. ***Id***. at 507.

Defendant attempts to diffuse the logic by arguing that the subject statute of limitations applies only to complaints filed with the commissioner of financial institutions, and that the power to remedy violations of the Act is vested exclusively in the commissioner. From our reading of the Act, we believe that it is the defendant who oversimplifies. First, the Act does not explicitly limit remedies to the administrative realm. Defendant has cited us to language that has qualifiers and cannot be read as broadly as defendant suggests:

> Any person aggrieved by the conduct of a title pledge lender under this chapter, in connection with the title pledge lender's regulated activities, *may* file a written complaint with the commissioner, who may investigate the complaint.
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> * * *
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> The commissioner shall have exclusive *administrative* power to investigate and enforce any and all complaints filed by any person that are not criminal in nature, which complaint relates to the business of title pledge lending.

Tenn. Code Ann. § 45-15-118 (c) (1) and (5) (emphasis added.) For the statute to have the meaning urged by defendant, two changes would be required, *i.e.*, change "may" to "must" or similar word and delete the word "administrative." If these changes were made, filing with the commissioner as opposed to court action would be required. As we previously stated, we cannot ignore words or assume they are without meaning.

We also note that the express statute of limitations was contained in the original 1995 version, which defendant concedes did not contain the administrative remedy through the

commissioner. *See* 1995 Tenn. Pub. Acts Chapter 186, § 13. The express limitation language was left untouched by the 2005 amendment. *See* 2005 Tenn. Pub. Acts Chapter 440, § 3.

The statutory scheme expressly provides a right of action, in court, to persons aggrieved by title pledge lenders in some situations. One situation is where the purported lender is operating without a license. *See* Tenn. Code Ann. § 45-15-105(b). When that happens, the loan is void and the lender forfeits any fees it could otherwise have charged under the act. ***Id.*** This statutory provision states as follows:

> The person making the loan shall return to the pledgor the pledged property, the titled personal property pledged, or the fair market value of the titled personal property, and all principal, interest, and any other fees paid by the pledgor. The pledgor is entitled to receive reasonable attorney's fees and costs in any action brought by a pledgor to recover from the person making the loan, the pledged property, the titled personal property, and the principal, interest and any fees paid by the pledgor.

Id.

A direct court action is also provided where the pledgor desires to proceed directly against a bond or letter of credit required of all title pledge lenders. All title pledge lenders must apply and qualify for a license. Tenn. Code Ann. § 45-15-106. They must file with their application either a surety bond or irrevocable letter of credit in the minimum amount of $25,000 per location with a maximum aggregate of $200,000. ***Id.*** at § (d) (3). "If the title pledge lender fails to pay a person or the commissioner as required by this chapter, then a person may bring suit against the title pledge lender directly on the surety bond or irrevocable letter of credit in any *court of competent jurisdiction* . . . ." ***Id.*** (emphasis added).

The harder and more important question that we must answer is whether, in identifying two specific instances when a pledgor has a private right of action against a title pledge lender, the legislature intended to limit the right to court action to those specific instances. It is not unusual for the courts of this state to apply the maxim that "the expression of one thing is the exclusion of another." ***Cellco Partnership v. Shelby County***, 172 S.W.3d 574, 597 (Tenn. Ct. App. 2005) (*quoting* ***City of Knoxville v. Brown***, 260 S.W.2d 264, 268 (Tenn. 1953)). Application of this maxim, however, has limitations. It is viewed as "merely an aid to the judicial mind." ***Id.*** It is most typically applied to the situation where "general words are used, followed by a designation of particular things or subject to be included or excluded as the case may be." ***Id.*** Further,

> it is to be said that the maxim, "Expressio unius est exclusio alterius," is not inflexible, and should always be applied so as to accomplish the legislative intention, and not to defeat it.

> [T]he method of construction summarized in the maxim . . . is one that certainly requires to be watched. * * * The failure to make the "expressio" complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind.
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> . . . It is often a valuable servant, but a dangerous master to follow. . . .

Board of Park Comm'rs v. Nashville, 185 S.W. 694, 699 (Tenn. 1916) (formatting in original.)

Applying these aids, we conclude that identifying two situations where a pledgor has a right of action against a title pledge lender was not intended as an exclusive list. The specific situations are identified, not in a list, but in diverse sections of the overall statutory scheme in a way that suggests the legislature intended it as a given that the injured pledgor had a private right to sue for violations. In section 45-15-105, the General Assembly declares the effect of a loan made by a lender without a license, and adds that in any action brought by the pledgor, he or she may recover attorney fees and costs. Similarly in subsection (d) of 45-15-106, the General Assembly specifies the form of surety needed to insure financial responsibility, and then adds, almost incidentally, that an injured pledgor can bring a suit against the lender directly on the security posted. The addition of these new sections in 2005, *see* Tenn. Pub. Acts Ch. 440 §§ 4 & 5, against the backdrop of an existing express statute of limitations strengthens our belief that the listed situations are just non-exclusive examples of situations where pledgors can sue their lenders under the Act.

We are mindful, as defendant insists we must be, that "[w]here an act as a whole provides for governmental enforcement of its provisions, we will not casually engraft means of enforcement of one of those provisions unless such legislative intent is manifestly clear." ***Crump***, 978 S.W.2d at 94. We trust that our discussion above demonstrates that we have not acted casually and that it is "manifestly clear" governmental enforcement is not the intended sole means of enforcement.

Defendant attempts to compare the Act to other statutory schemes, such as the Tennessee Consumer Protection Act, "which are crystal clear in their provisions of remedies." This argument is without merit as we are examining the Act for an implied right of action, not an express right of action. Implied rights, by definition, are not crystal clear, and must be found from what was intended but not explicitly stated.

Defendant also argues that proposed amendments introduced in 2007 prove the Act provides no private right of action. Those proposed amendments contained express recognition of a private of action. Defendant argues that there would be no need for such an amendment if a private right of action already existed. The most obvious problem with this argument is that the amendments failed. We are not told why they failed, so it may have been that they failed because there was no need to amend to add what already existed.

In summary, we have tried to ascertain the legislative intent without forcing the interpretation so as to limit or expand the application. ***Eastman***, 151 S.W.3d at 507. We have looked at the various provisions in context rather than isolation. ***Id.*** We have assumed that the words were chosen purposely to convey particular meaning. ***Id.*** We have followed the outline provided in C***rump*** for determining whether a statute provides a private right of action. As a result, we hold that the Act does create a private right of action in favor of pledgors for violations of the Act by predatory lenders[3].

III.

The order of the trial court dismissing all claims made under the Act is vacated. Costs on appeal are taxed to the appellee, Tennessee Title Loans, Inc. This case is remanded to the trial court, pursuant to applicable law, for further proceedings consistent with this opinion.

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CHARLES D. SUSANO, JR., JUDGE

[3] No statement in this opinion should be taken as an expression, one way or the other, of the merits of this suit, including whether or not defendant has acted in a manner inconsistent with the Act. We are simply following the rules for reviewing a dismissal for failure to state a claim, and taking all plaintiffs' allegations as true at this early stage of the proceedings.